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KC

THE KING'S COUN

MAGAZINE

Clive Grossman KC

INTERVIEW
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On Administrative Law

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Ms. Rosalind Write, CB KC
On Jewish women lawyers

Lord Chancellor John Copley
On the defence of insanity

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EDITORIAL

The art of cross examination and advocacy are two skills every legal practitioner must be armed with. The success of any litigation squarely rests with the arguments deployed by the prosecution and the defence. The cross examination elicits evidence which is hard to come by and then persuasion is part of advocacy and drives the jury and the judge to adopt a certain decision. This is so with public affairs and economic governance of a country.

We have spoken to **Clive Grossman KC** a very senior lawyer with a history of successful practice in Rhodesia (now Zimbabwe) and in Hong Kong. He has been the Vice Chairman of the Hong Kong Bar Association. He has given his perspective on practice and on various snippets on cross examination and advocacy. He has published his autobiography **From Hackeny to Hong Kong – The Story of a Lucky Man** published by the Faculty of Law University of Hong Kong Press. A reading of this book provides a glimpse into a busy lawyer handling high profile cases.

We have provided an interview our sister publication The Anglo-American Lawyer Magazine had with **Prof. Paul Craig of Oxford University** an authority on Administrative Law. He has given his scholarly analysis on very important issues concerning administrative law.

Defence of insanity is a question that has been a major controversy when **Daniel M'Naghten** was aquitd in 1843 when he mistook UK Prime Minister Robert Peel and shot Edward Drummond instead. We thought we should revisit the debate at the time. We have reproduced the **Lord Chancellor John Copley's** speech at the House of Lords as it provides the background to the case.

The contribution by Jewish women to humanity is immeasurable. We have reproduced an article by **Ms. Rosalind Write KC** former Director of the Serious Fraud Office UK outlining the work of Jewish lawyers in the UK and elsewhere.

We trust the December issue provides rich sources of reading materials for the legal community and for the advancement of English law.

Srinath Fernando,
LLM (UK), LLM (Colombo)
Editor-In-Chief / Publisher
01st December 2022

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NOTICE TO UNIVERSITY PRESSES / BOOK REVIEWERS

University Presses and Book Reviewers may contact the Magazine for book reviews on new law publications. The ideal word length should be around 1000 words in a clear format preferably on Word document. However if a longer review is needed prior consensus must be had as editing would vitiate the essence and the quality of the review.

INTERVIEW - Clive Grossman KC

KC – The King's Counsel Magazine: Clive Grossman KC, we are truly pleased to have a conversation with you, being one of the leading Barristers with a specialization in public law and criminal law. You have been listed by the International Criminal Court of Justice as a Counsel. You have had wide exposure in many fields of having practiced law in Rhodesia (now Zimbabwe) and Hong Kong. You have also been the Vice Chairman of the Hong Kong Bar Association. You came from the private bar in Rhodesia (1967 – 1983 in Zimbabwe) and then joined Hong Kong Attorney Generals Department position and rose to the Deputy Director of Public Prosecutions and Head of Commercial Crime Unit and then reverted to private practice in Hong Kong. You authored your autobiography **From Hackney to Hong Kong—The Story of a Lucky Man,** published by the University of Hong Kong, which gives a detailed narration of your life and trials and the experience and exposure you gained by working in the Rhodesian Army before taking the legal journey and your work as a Counsel. It really must be read – a thrilling experience. It's an excellent presentation of facts. We would love to hear about the genesis of your legal career and where you have reached now?

Clive Grossman KC: Thank you very much for your invitation. I should be happy to deal with your questions.

KC – The King's Counsel Magazine: What were your most celebrated cases in Rhodesia when Zimbabwe was under British rule. You said in your Autobiography that you defended some French mercenaries who had joined the Rhodesian Army. That must have attracted press focus at the time.

Clive Grossman KC: I should tell you about the first part of my career. I studied at the University of Cape Town and the law in Southern Africa, which included what was then Rhodesia (and later Zimbabwe) was Roman Dutch law. It originated from the laws in ancient Rome and were adopted and adapted by Jurists in Holland. By the time I finished university in 1966, Rhodesia, as it had been, was no longer under British rule because the country had declared what we called UDI ("Unilateral Declaration of Independence") in 1965. However the common law remained the same. I appeared in a number of cases that became quite well-known. In particular a man called Aiden Diggenden who was renowned, possibly throughout the world, as the person who had escaped from prison the most often. He was always recaptured though. On his last escape, I prosecuted him. His defence basically was that escape from prison was so easy, he could not resist it and his

defence amounted to provocation. Needless to say, he was unsuccessful.

Rhodesia became Zimbabwe in 1980. The law continued much as before, for a while anyway. Amongst others, I defended a French mercenary. He was one of three. I should explain that during our guerilla war, which I describe as a terrorist war, there was set up a mercenary brigade. These three Frenchmen had stopped a car which was being driven by an East German mercenary and they murdered him for his money. For reasons I can no longer recall, my client was acquitted, but the other two were sentenced to death and hanged.

KC – The King's Counsel Magazine: Are there similar celebrated cases in Hong Kong? You were the defence counsel for the first person after the imposition by Beijing of the National Security Law. The Hong Kong Free Press had reported about the crucial role you played in this case. Could you elaborate on this case?

Clive Grossman KC: This case you mention happened the day after the National Security Law was enacted. My client, who was a very young unemployed waiter, decided to have some fun. He carried a flag which was in English and Chinese, and which purported to urge people to secede from China. He did this while riding his motorbike in a district where there had been demonstrations and every time he saw a line of policemen he would drive fast towards it trying to avoid hitting anyone but causing a great deal of fear etc. Eventually he collided with some policemen and was arrested. He was charged with and convicted of advocating secession and an act of terrorism. He was sentenced to 9 years imprisonment. It has never been my practice to publicly criticize judgments and I do not propose to do so on this occasion. I did advise my client however to appeal but for reasons unbeknown to me, he withdrew his appeal.

KC – The King's Counsel Magazine: You seem to have witnessed all aspects of political developments from Rhodesia to Zimbabwe. How do you see the events from the benefit of hindsight?

Clive Grossman KC: I left Zimbabwe in 1983 and only returned a couple of times to see my mother before she passed away in 1997. So let me say immediately that I am by no means conversant with more recent events in Zimbabwe. However I do read whatever I can about the country and what is perfectly clear is that the country has deteriorated enormously. Under Robert Mugabe, who was the first Prime Minister after independence, corruption was an everyday affair, from policemen stopping cars to senior members of Government simply putting foreign aid money in their pockets. Furthermore inflation went berserk. I had quite a lot of money left in Zimbabwe when I left but this all disappeared in the inflation. I have the last dollar note that was printed in Zimbabwe. It is for $100 trillion. It became worthless the day it was printed. Rhodesia as it was, even under universal sanctions, was still described as the bread basket of Africa and despite the sanctions we used to export large amount of maize and tobacco to neighbouring countries. However since then the country has deteriorated, inflation is back although not to the same extent under Mugabe, people going hungry and over half of the population unemployed.

KC – The King's Counsel Magazine: You must have got a different

perspective on law when you joined the Legal Department of Hong Kong from private practice. Could you tell us your exposure in prosecution? What really changed your perception?

Clive Grossman KC: We came to Hong Kong in 1983 and I became a prosecutor. At the time I arrived, a huge case was about to unwind and it was called in short the "Carrian case". It involved a person called George Tan. In the previous few years, large numbers of people had invested huge amounts in Carrian which eventually went bankrupt. The details of it I won't repeat here as it takes too long. However it did give me insight into how the law worked in Hong Kong and I was happy to find that it was almost identical to the way in which had known it in Africa. In criminal matters, you have to prove your case as a prosecutor beyond all reasonable doubt, and the laws of evidence were very similar to English Common Law. The case lasted for some 18 months and we lost eventually but it did give me a great insight how the cases were run in Hong Kong.

KC – The King's Counsel Magazine: What are your views on the art of cross examination and the skills in advocacy?

Clive Grossman KC: I have lectured quite extensively on cross examination and I do not wish to take up all your time and space with my lecture so I will confine it to the art of cross examining expert witnesses. In criminal matters and indeed in many civil matters, one side will call an expert. This may be on matters of fingerprints, building construction, finance, the practice of medicine etc etc. In order to cross examine an expert and to show that he/she is wrong or that there are alternatives to what he/she is maintaining, one would need to know as much about what he/she is talking about at that person. For that reason one would not go to trial unless on one's own side there is another expert who says that the opposition expert is incorrect. And you would need to go into fine detail to be able to cross examine the expert. For instance if you are talking about white collar crime, market misconduct, etc, you would have to delve into the finer details of economics even though you have never studied it yourself. I have had to train myself over the years in things like the manufacture of ink, and its age, whether a surgery had been done properly or not, how a fire started, why a construction collapsed etc etc. It is hard work but fascinating.

KC – The King's Counsel Magazine: We would love to hear some interesting narratives in cross-examination during your long career in legal practice either in Rhodesia or Hong Kong.

Clive Grossman KC: I have mentioned that I once had to cross examine someone in connection with ink. The position was this. There was a lady in Hong Kong named Nina Wang, who was considered the wealthiest woman in Asia. She and her husband had bought property in the New Territories here not long after the Second World War and resold it parcel by parcel for billions of dollars. For reasons that were unclear, Mr Wang made a will in the 1960s leaving everything to his father. Moving on for some decades. Her husband was kidnapped and held for ransom and despite his wife paying $50 million, he was murdered, and thrown into the sea. However Nina Wang did not accept that he was dead and spent a great deal of money trying to prove that he was held captive somewhere possibly in Taiwan. Meantime her father-in-law was trying to probate the will on the basis that he

was the sole beneficiary and Nina Wang was opposing it.

In Hong Kong, if a person has disappeared and there has been no sign of him for 7 years, the court can declare him dead. And this is what the father tried to do. Nina Wang opposed this unsuccessfully. At the end of the hearing when the Judge declared her husband to be dead, she handed over an envelope to the Judge. She said that her husband had given it to her and told her not to open it until after he was dead. And she said to the Judge "You have declared him to be dead and I give you his envelope to open". Inside the envelope was another will leaving his whole estate to her.This went to trial and one of the issues was the age of the ink. The father had an expert from the United of States who said that he could tell that the ink was no more than 3 years old. And since the wife had not seen her husband for at least 7 years, the will must be a forgery. We also engaged an expert, a Russian who lived in Chicago.I was sent to a factory in Ottawa to learn all about ink, how it was manufactured and how it aged. I had to learn a lot of chemistry which I had failed at school but nevertheless found it most interesting. At the end of the day, the Court found that the father's expert was not an expert at all and our expert who said that the age of the ink could not be determined and it could have been as old as 15 years was believed.That was one of my better experiences in cross examination.

KC – The King's Counsel Magazine: Being the Vice Chairman of the Hong Kong Bar Association the most challenging task you have had to grapple with must have been the change of administration from British to Chinese. What impact did that have on the practice of legal profession in Hong Kong?

Clive Grossman KC: At about the time I was Vice Chairman, Hong Kong transferred from being under British Rule back to Chinese Rule under the system named as "Two Countries One System". In the years leading up to the handover as we called it, there was a great deal of concern in Hong Kong as to what would happen when we became again part of China. Many people emigrated to Canada, United Kingdom, etc in order to get new passports.

When the night came for the handover, there was still of a great deal of trepidation as to whether or not the People's Liberation Army would simply walk in and take over everything. This did not happen. We carried on much as before and a large number of people returned with their families to Hong Kong. It was the beginning of an era of increased prosperity for Hong Kong. The legal profession did not change in any way, save that in the course of the years there were more and more Chinese Judges and in my respectful view, this simply increased the standard of the Judiciary.

KC – The King's Counsel Magazine: There has been a spate of resignations of Senior Judges of the Zimbabwe judiciary such as resignation of the former Chief Justice Antony Gubbay and High Court Judge David Bartlett etc. Can you throw some light as to these resignations? Was it because they were being radical, being independent or bereft of any political affiliations.

Clive Grossman KC: I was no longer in Zimbabwe when Chief Justice Gubbay and High Court Judge David Bartlett left the Bench. I knew Chief Justice Gubbay very well as we had appeared against each other as counsel in the past. He lived in a city called Bulawayo. I sat there with him as an Acting Judge for a few months. He was a very fine man and a very fair Judge. However after Mugabe came to power, he got rid of all the white judges and replaced them with his supporters. There is no doubt of this and no different view has ever been suggested or published as far as that is concerned. Chief Justice Gubbay was simply told to leave and an incompetent barrister who was a supporter of Mugabe suddenly became Chief Justice. I did not know Judge Bartlett very well but I understand that he resigned together with other white judges when it became clear that their time on the Bench was very limited. The packing of the court with persons loyal to Mugabe and his party was typical and indicative of life in Zimbabwe.

KC – The King's Counsel Magazine: In conclusion of this interview, what advise would you give to a young lawyer on practice and professionalism in lawyering?

Clive Grossman KC: I have no doubt that the profession of law is one that will continue into the foreseeable future. When I am asked what is the most important quality for a lawyer, I have no hesitate in saying Honesty. There are of course lots of jokes about how lawyers are crooks etc and I read recently a report from England saying that the weather was so cold that lawyers were seen walking around with their hands in their own pockets! However we must be honest with our clients and with the court, there is no doubt about that. Things are changing in the matter of practice of course, especially since COVID. Zoom has found its feet and trials are and will take place at a distance and submissions and papers will soon I think be filed electronically rather than on paper. I wish anyone who reads this very healthy legal career.

Clive Grossman KC: We came to Hong Kong in 1983 and I became a prosecutor. At the time I arrived, a huge case was about to unwind and it was called in short the "Carrian case". It involved a person called George Tan. In the previous few years, large numbers of people had invested huge amounts in Carrian which eventually went bankrupt. The details of it I won't repeat here as it takes too long. However it did give me insight into how the law worked in Hong Kong and I was happy to find that it was almost identical to the way in which had known it in Africa. In criminal matters, you have to prove your case as a prosecutor beyond all reasonable doubt, and the laws of evidence were very similar to English Common Law. The case lasted for some 18 months and we lost eventually but it did give me a great insight how the cases were run in Hong Kong.

The Jewish women who were among the first to seize the opportunity to be lawyers

By Rosalind Wright CB KC (former director of the Serious Fraud Office UK), (Published in the The Jewish Chronicles 2022)

It has been a century since women first became able to practice law in Britain. December marked 100 years since women were able, for the first time, to become lawyers in the UK. Jewish women were among the first to seize the opportunity to practise and their contribution has been extraordinary. The first woman ever to represent a client in court in the British Empire was Ethel Rebecca Benjamin who, in 1897, sought the recovery of a debt in her native New Zealand. The daughter of Orthodox Jews who had emigrated from England in the late 1860s, she was admitted as a barrister and solicitor on May 10, 1897, in New Zealand. She married Alfred De Costa, a Wellington stockbroker and in 1908 they moved to England. During World War I, Ethel De Costa managed a bank in Sheffield — the first woman bank manager in the UK.

In March, 1920, Dr Averyl Harcourt, daughter of the Reverend M.E. Duke-Cohen, Chief Rabbi of Calcutta, was admitted as a student of Middle Temple. Rita Reuben, daughter of Nassim Reuben of Singapore was called to the Bar by Middle Temple in January, 1924. Maria Alice Phillips, née Westell, was called to the Bar by Middle Temple on November 19 1923, the first Jewish woman barrister in England and Wales. She celebrated her 100th birthday in 2001, together with her large family, with a ride on the London Eye.

Sara Moshkowitz was called to the Bar in November 1925. Born in Kishinev, she arrived in England in 1920 and was granted a scholarship by Lincoln's Inn. She combined legal practice with painting and exhibited at the Royal Academy in 1930. She took a strong interest in Zionist activities and made Aliyah to Palestine where, by 1939, she was one of only three women practising lawyers, specialising in commercial law. Edith Vera Cohen, called to the Bar in 1929, practised on the Northern Circuit, became the mother, grandmother and great-grandmother of a succession of successful lawyers. Her passion, however, was for diving. Selected for the British Olympic diving team in the 1920s, her father refused to allow her to take part on the grounds that women "shouldn't be exposing themselves". She practised in crime and family law up until the mid-1950s.

Nellie and Esther Leviansky were two of the very first women solicitors. They were the daughters of Hampstead solicitor William Leviansky, who also had two sons, both of whom died in the First World War. William brought his daughters into the family firm as articled clerks. Both qualified in 1926 and ultimately became partners.

The first woman to practise in mandatory Palestine was Rosa Ginsberg (Ginossar), who was born in 1890 in Gomel, Russia. She grew up in a strongly Zionist home. Her father was a friend of Asher Ginsberg, who wrote under the name Ahad Ha'am. She married his son, Shlomo. They moved to Paris, where Rosa studied law and in 1922 Shlomo and Rosa immigrated to Palestine where Rosa commenced an eight-year battle with the British mandatory authorities to allow her to qualify. Refused a licence

to practice, she was told that an advocate had to be "a person" — that is, a male person — and the words orekh din (the Hebrew term for "lawyer") referred strictly to males. Finally, in 1930, Rosa Ginsberg received her licence from the Chief Justice, who noted that the right of women to serve as lawyers in Palestine was a direct result of her struggle. During the Mandate she worked for the welfare of women. After the establishment of Israel she defended cases brought by the Mandate authorities against "illegal" immigrants. She managed to obtain aliyah certificates for hundreds of refugees. She continued to work at her legal practice until 1949 when her husband was appointed as Israel's ambassador to Italy, when the couple changed their name from Ginsberg to Ginossar. Despite her long and arduous journey to acceptance, Rosa was pipped at the post by Freda Slutzkin, a 26-year-old Australian, who was admitted to the Palestine Bar only a few weeks before Rosa. Freda took her law degree at the Jerusalem School of Law, part of the Hebrew University in Jerusalem.

Her fellow (male) students translated for her and taught her Hebrew. She graduated with flying colours. On marriage, she emigrated to the USA where, in 1943, she received a second law degree and was admitted to the New York Bar. She continued to practise, largely in the field of criminal defence work, taking pro bono cases involving young offenders, while becoming a distinguished and successful painter in New York.

Rose Heilbron, the most celebrated lawyer of her time, was the first woman to win a scholarship to Gray's

Inn, the first woman to be appointed a KC, the first to lead in a murder case, the first woman recorder, the first woman to sit as a judge at the Old Bailey and the first woman Treasurer of Gray's Inn. Born in Liverpool, her father had a boarding house for immigrant refugees. He took over a small hotel in which his daughters were expected to help, but Rose's mother insisted that she study and had elocution lessons. Rose graduated with first-class honours in law from Liverpool University in 1935. Two years later she was called to the Bar, joining the northern circuit, of which she would become leader in 1973. Her meteoric rise after the War proved that she was head and shoulders above most of her (male) contemporaries. A Liverpool journalist of the time recalls, "She got up there by sheer hard work and cleverness." By 1946, Rose had appeared in 10 murder trials. In 1949, at the age of 34, she was made one of the first two women King's Counsel (KC). She became the first woman to lead in an English murder case and defended a man accused of murdering

She was called to the Bar at Gray's Inn in 1950. She married Colonel Mordaunt Cohen, a solicitor, in 1953 and was the first woman to be taken on as a tenant in chambers in

his mistress in his office. After the trial a fan wrote, "Dear lady, you can't go around persuading juries that men are entitled to strangle their lady friends." She was appointed as a judge at the Old Bailey in January 1972 and in October 1974 became only the second woman to be appointed a high court judge. Myrella Cohen read law at Manchester.

She was called to the Bar at Gray's Inn in 1950. She married Colonel Mordaunt Cohen, a solicitor, in 1953 and was the first woman to be taken on as a tenant in chambers in Newcastle. With two young children, she worked part-time at the Bar for eight years. In 1970 she took silk, only the second Jewish woman to do so following Rose Heilbron. In 1971 she was appointed Recorder of Hull. The following year she was appointed a circuit judge and deputy High Court judge in the Family Division. She had a formidable reputation as a "no-nonsense" judge in criminal cases. Strictly observant, she was a firm believer in women's education and careers, and castigated the traditional attitude that pushed women into early marriage and tied them to the home. Judge Cohen sat at the Old Bailey and at Harrow Crown Court, where a fellow judge was Her Honour Dawn Freedman, who later co-operated with her in her work on pre-nuptial agreements and the problem of the aguna ("chained woman") whose husband has refused to give her a "get" (a Jewish divorce). When she retired in 1995, Myrella Cohen was the longest-serving woman judge and longest serving Jewish judge.

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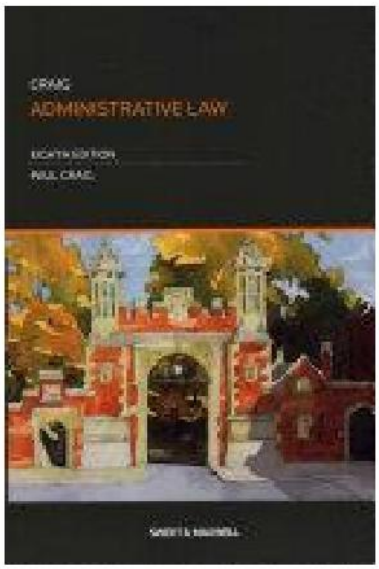
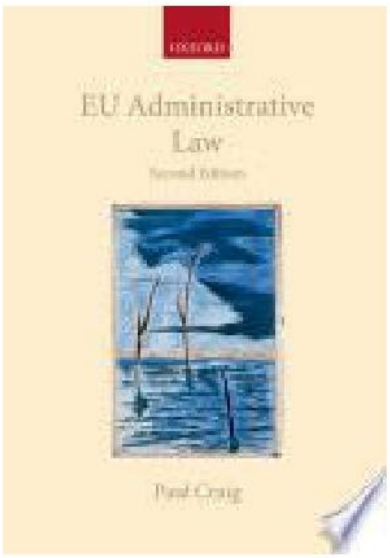
https://www.thejc.com/news/features/the-jewish-women-who-were-among-the-first-to-seize-the-opportunity-to-be-lawyers-1.494962

Prof. Paul Craig on Administrative Law





Paul Craig was educated at Worcester College, Oxford, where he subsequently became a Fellow and Tutor in law in 1976. He was appointed to a Readership in 1990, and then became an ad hominem Professor in 1996. He was appointed to an established chair in 1998, the Professorship in English law, which is held at St John's College Oxford. He was made an Honorary QC in 2000, and an Honorary Bencher of Gray's Inn in the same year. He has lectured at many other institutions across the world, including in North America, Europe, China and Australia. He is editor of the Clarendon Law series, co-editor of a monograph series on EU law in Context, and is on the editorial board of various law journals. He is also a delegate of Oxford University Press, and the alternate UK member on the Venice Commission for Law and Democracy. His research interests include Constitutional Law, Administrative Law, Comparative Public Law and EU Law, and he has published widely in these areas. Source; https://www.thebritishacademy.ac.uk/fellows/paul-craig-FBA/

The AAL Magazine: Why is Administrative Law Paramount in Governing a Country?

Prof. Craig: Administrative law exists because regulation exists. Parliaments in every country regulate a very great many things, ranging from social welfare to the environment, from banking to securities regulation, and from planning to education. Parliament will commonly do so through grant of duties and powers to ministers, agencies and the like. Administrative law is paramount in governing a country because it is there to ensure that the duties and powers given to the administration, broadly conceived, are fulfilled, that the grantee of the duty or power remains within the limits accorded by the enabling legislation and that certain key principles of good administration, such as natural justice, are observed, when the power is exercised. Thus was it ever so. Administrative law developed in the UK from the mid-16th century onwards, with earlier origins. The development was directly linked to the growth of regulatory legislation by the Tudors and Stuarts, which then

generated the case law that laid the foundations of UK Administrative law.

The AAL Magazine: Has there ever been a suggestion that over regulation of the public conduct is a hindrance to human progress?

Prof. Craig: It is not uncommon for governments to complain that judicial review imposes burdensome constraints on fulfilment of government functions. There is, however, no warrant for any claim that the kind of regulation of government conduct that occurs through administrative law constitutes any hindrance to human progress. Nor is there much foundation for the assertion that judicial review is unduly burdensome on government. It is perforce true that if administrative law did not exist then governments would not be troubled by judicial review. Such review is, however, as noted in answer to the first question, necessary, inter alia, to ensure that the executive remains within the remit of the power given by Parliament, and that when exercising such power/duty it complies with basic principles of good administration. The courts are, moreover, acutely aware of the need to ensure that administrative law does not unduly hamper the discharge of government business, and this is evident in a number of different administrative law doctrines.

The AAL Magazine: What would be your prognosis on the net result of UK having got itself divorced from EU. What impact does this have on the EU jurisprudence in UK?

Prof. Craig: These are big questions. In purely legal terms, the UK is no longer bound by EU law, in the sense that new EU regulations, decisions and directives no longer bind the UK, nor does new case law from the CJEU. There are, however, exceptions and qualifications to these basic propositions derived the UK Brexit legislation, from the UK-EU Withdrawal Agreement and from the UK-EU Trade and Cooperation Agreement. Paradoxical though it may seem, the UK's exit from the EU went hand in hand with bringing the entire EU acquis communautaire into UK law. The paradox is, however, readily explicable. The UK had been part of the EU for nearly 50 years, with the consequence that many matters were regulated by the EU. There would commonly not be autonomous UK law in many of these areas. It was, therefore, necessary to bring the entirety of EU law into UK law in order to prevent the existence of regulatory black holes in the UK statute book. The idea was that the UK would then engage in a two-stage process. It would render the EU thus domesticated fit for purpose by the time that we exited the UK; the UK Parliament could then decide at its leisure thereafter whether it wished to retain, amend or repeal the EU legislation. This, however, led to complex domestic statutes dealing with issues concerning the status of retained law in the UK, and the extent to which UK courts could consider CJEU case law in the future. The UK courts will continue to grapple with these issues for a number of years to come.

The AAL Magazine: Prof. Craig, Rule of Law is the fundamental doctrine by which every individual and every government authority must obey and submit to the law. In essence what it means in principal is that everyone is equal before the law and all must obey the law. UK does not have a written constitution however the rule of law, and the Parliamentary Sovereignty and

court rulings are fundamentally the bedrock principles of the unwritten constitution. Could you please explain as to how this delicate balance is maintained in the UK?

Prof. Craig: This is another very large question. Given the exigencies of space, the answer is as follows. There are, as is well known, different conceptions of the rule of law. At its most basic it captures the idea of rule by law, in the sense that it is incumbent on those in power to point to a basis that is regarded as valid by that legal order if it wishes to enact legislation, or exercise any other form of authority. There is then a broader idea of the rule law, espoused most notably in the modern day by Professor Raz, which regards the rule of law as essential for guiding human conduct, from which he then deduced a number of more specific attributes of the rule of law, such as that it should be prospective, not retrospective and that there should be an independent judiciary. Both of these models of the rule of law are formal, in the sense that they do not turn on the substantive content of any particular law. It is therefore possible on both such models for the rule of law to be followed in an autocratic society. There are, however, more substantive conceptions of the rule of law, espoused by writers such as Professor Dworkin and Lord Bingham, which include the elements from the previous two models, but also go further and require protection for fundamental rights and principles of good administration.

These principles underpin and inform the principles of judicial review, as they have been developed by the courts over 400+ years. They also underpin and inform principles of statutory interpretation, such as the principle of legality, through which the courts interpret primary legislation so as to ensure, where possible, that it does not infringe fundamental rights. It is through such techniques that the courts advance the rule of law in the UK, against the backdrop of parliamentary sovereignty. They have been pretty good at doing so over the years.It, nonetheless, remains the case that parliamentary sovereignty is the dominant constitutional principle in the UK, insofar as it is expressive of the idea that there are no barriers, procedural or substantive, on what the can be done by the sovereign legislature. There might be instances where what was done was such that the courts really would baulk at accepting the result, which might then precipitate a technical legal revolution. Subject to this possibility, it is open to Parliament to enact whatsoever laws it should choose to do. This includes matters such as limiting the remit of the Human Rights Act 1998, and it includes also repeal of constitutional statutes, provided that this is done expressly and unequivocally.

The AAL Magazine: There have been occasions in the UK's legislative history where the Parliament had promulgated legislation with retrospective effect. I would like to cite the War Crimes Act of 1991. Of course all those who have found to have committed horrendous war crimes in Nazi Germany must be held accountable. I am fully in agreement with the underlying legislative principle. However for our analysis, I find this retrospective legislation goes against the very principle – which I believe is postulated by Dicey – that laws must not be retrospective hence a person cannot be tried for an offence if the conduct was not an offence at the

time the offence was committed. What is your take on this Prof?

Prof. Craig: I find this particular example less troubling. We go back to fundamentals. Retrospective legislation is rightly regarded as contrary to principle, since it offends the basic tenet of the rule of law, to the effect that people should be able to plan their lives secure in the knowledge of the consequences of their action. This is not possible where law is rendered applicable to facts and circumstances that took place prior to the enactment of the retrospective law. This fundamental precept is even more important where the law that is retrospective imposes criminal punishment. There are, however, two circumstances where retrospective laws are less problematic.The first relates to situations in which a law is rendered retrospective in order to remove a penalty imposed under an unjust law. This is exemplified by the retrospective removal of a penalty imposed under an apartheid law. Pretty much everyone would agree that this type of retrospective law is acceptable. The second relates to situations where the retrospective law imposes sanctions on behaviour which, although it might not have been formally illegal at the time, was nonetheless offensive to some fundamental tenet of morality, sufficient to warrant the retroactive component of the relevant legislation. There will not be many instances in which this is necessary, in large part because in most instances the relevant action will be covered by an existing legal rule. However, in rare instances where this is not so, the retroactivity can be justified.

The AAL Magazine: Professor, I can still remember we had a lecture on the Doctrine of Proportionality and I understand this is principle developed in the EU. Prof. Jeffrey Jowell, QC articulated that the proportionality test to involve a four processes namely, that the action pursued must have a legitimate aim, whether the means deployed suitable to achieve that aim, and whether the action could have been achieved by a less restrictive alternative. I find that these four thoughts are a subjective matter for the Judiciary. It could be interpreted differently by various judges according to their own way of thinking. Do you think this principle has not been as adequately critiqued as it should have? How would you respond to this? Could this principle be further refined and built upon.

Prof. Craig: Proportionality is a general principle of EU law, and is thus used in all types of case, irrespective of whether they involve rights-based challenges to government action or whether they are ordinary administrative law cases. Proportionality thus far in the UK applies under the HRA 1998 and in the context of legitimate expectations, and it used to apply when the UK was implementing EU law, while still a Member State of the EU. There is a vibrant debate in the UK as to whether proportionality should be applicable outside the domain of the HRA 1998, such that it can be applied in ordinary public law cases. I believe that it should, although I am probably in the minority in this respect. This is certainly not the place to repeat or traverse the multiple arguments back and forth concerning this issue.

Suffice it to say for the present, that those against the further application of proportionality do not generally argue

that this is because the meaning of 'necessary' or 'suitable' may be contestable, or that the terms might be interpreted differently by different judges. They are right not to base any weight on this point. This is because it is equally true for just about any precept in public law, or private law. Different judges might interpret reasonableness in public law differently, and there might be similar divergence of view as to the application of reasonableness in negligence cases.

The AAL Magazine: Professor, I would like you to refer to the very famous case in UK *R v North and East Devon Health Authority, ex party Coughlan* in which substantive legitimate expectation was the driving force behind that judicial determination. How does the policy of the authority be implemented when there are expectation that have been conveyed by a previous administration assume if the expectation itself may not have undergone proper scrutiny at the time it was made known. Eg conveying the impression that a public facility could availed for life. Would not this be a dilemma to the incumbent administration? Do you think that the doctrine of legitimate expectation must be critiqued in such a way that priorities of the government too must be given pre-eminence provided priorities are of national concern? Can the Government - for example - take over the Mardon house on the pretext of land acquisition for development purposes or for a new highway to be built over Mardon house?

Prof. Craig: The point that you make is an important one. The courts have, however, built two safeguards into the doctrine of substantive legitimate expectations. The first addresses the very point that you make. It is difficult for a claimant to prove that any such expectation has been created. The claimant will have to show that there was a specific and certain expectation and the courts will also ensure that the background facts said to generate the expectation provided a plausible basis from which to conclude that an expectation had been intended. A very great many cases fail on this ground at this juncture. The courts are therefore mindful of the risks of saying that a legitimate expectation has been created and mindful of the constraints that it might place on the public body's freedom of action. The second point to note is that the doctrine of substantive legitimate expectation allows the public body to plead overriding concerns relating to the public interest, which thereby allows the public body to resile from the expectation that it had created. It will be for the court to decide whether the public interest concerns thus pleaded warrant departure from the legitimate expectation.

The AAL Magazine: Professor, as you know that the rule of law demands that the courts retain a supervisory jurisdiction over the exercise of public power and this manifested in the doctrine of judicial review and this is primarily to guard against the abuse of power and to ensure that executive actions are within the bounds of law. But sometimes the legislature removes the public from challenging the decision of the public authorities. Do you think ouster clauses are contrary to the principal of judicial review - hence it must be done away with?

Prof. Craig: Judicial review has, as noted above, existed for a very long time in the UK. It has origins that date back to the 14th century, and really began to develop from the beginning of the 17th century. There have, over time, been repeated efforts by

Parliament to exclude the courts, in the form of ouster clauses. The judicial attitude to such clauses has been pretty constant over time. They have, not surprisingly, resisted such clauses and interpreted them narrowly, for the very reasons that you note in your question. An ouster clause purports to remove the authority of the courts and hence the availability of judicial review from the particular area to which the ouster clause is applicable.

It is, however, not possible to 'do away' with such clauses in a system based on parliamentary sovereignty. The courts and commentators can try to persuade Parliament that such clauses should not be used, but the courts cannot outlaw them, since this would be to imply a limit on parliamentary sovereignty, and hence run counter to that constitutional principle.

The AAL Magazine: There have been many critiques on the decision of the *Privacy International* on ouster clauses. Has it broken a new ground on ouster clauses?

The judicial and academic contestation concerning *Privacy International* centred largely on the facts of the case in the following sense. The difference between the Court of Appeal and the Supreme Court, and the difference between the majority and minority in the SC, turned largely on whether it was necessary to interpret the ouster clause very narrowly, given the nature of the specialist legal tribunal in question.

Thus, the Court Appeal, distinguished *Anisminic* in part because s.67(8) was framed so as to exclude judicial review even in relation to decisions as to whether the IPT had jurisdiction. The Court of Appeal concluded that the case was therefore different from *Anisminic*, since the wording of s.67(8) ousted judicial review of decisions as to whether the IPT had jurisdiction. This, coupled with the fact that the Investigatory Powers Tribunal was an independent body with considerable expertise over the subject matter, which exercised a power of judicial review over the bodies subject to its remit, led the Court of Appeal to dismiss the claim.

In the SC, Lord Sumption dissented, and Lord Reed agreed with his judgment. Lord Sumption held that the purpose of judicial review was to maintain the rule of law. However, the rule of law was sufficiently vindicated by the judicial character of the Tribunal. It did not require a right of appeal from the decisions of a judicial body of this kind. Section 67(8) was not therefore an ouster of jurisdiction that constitutional principle required the High Court to have.

The majority in the SC took a contrary view. Lord Carnwath, with whom Baroness Hale, Lord Kerr and Lord Lloyd agreed, held that there was a fundamental common law presumption that the supervisory role of the High Court over other adjudicative bodies, even those which had been established by Parliament with apparently equivalent status and powers to those of the High Court, should only be excluded by clear and explicit words. Lord Carnwath concluded that s.67(8) applied only to a legally valid decision relating to jurisdiction. A decision that was vitiated by error of law, whether "as to jurisdiction" or otherwise, was no decision at all. Judicial review could only be excluded by "the most clear and explicit words" and s.67(8) did not suffice in this respect.

The AAL Magazine: If I may venture into 'discretionary justice' in UK, some public functionaries are given discretion to make decisions. The *Wednesbury* reasoning is the best any public functionary could take cognizance of. However Wednesbury reasoning has now a new dimension such as the doctrine of proportionality. How do you define discretionary justice and how it is to be realized?

A big question, but the essential point is as follows. It is accepted by all that there must be some control over discretionary power, in order to ensure that it is not abused, and that it is not used to attain improper purposes. It is accepted by all that the courts should not, however, substitute judgment on the merits. They should not overturn the administrative decision merely because they would have made a different decision if they had been the primary decision-maker. The UK courts do not do this and recognize that they should not do this.

Subject to the above, there is contestation as to the intensity of such review, and whether it is best done through reasonableness or proportionality, or though an admixture of the two. I would emphasize in this regard the importance of reason-giving and assessment of evidence when considering the relevant intensity of review that should pertain to different types of case. (This interview first appeared in our sister publication - The Anglo-American Lawyer Magazine)

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INSANITY AND CRIME – REVISITING M'NAGHTEN RULES

SPEECH DELIVERED BY LORD HIGH CHANCELLOR OF GREAT BRITAIN JOHN COPLEY, 1ST BARON LYNDHURST, PC QC, IN THE HOUSE OF LORDS IN 1843

The Lord Chancellor

I have felt anxious, my Lords, at the earliest possible day to call your Lordships' attention to the subject of the notice, which I gave on a former occasion, with reference to a late trial. The circumstances connected with that trial have created a deep sensation amongst your Lordships, and also in the public mind. I am not surprised at this. A gentleman in the prime of life, of a most amiable character, incapable of giving offence or of injuring any individual, was murdered in the streets of this metropolis in open day. The assassin was secured; he was committed for trial; that trial has taken place, and he has escaped with impunity. Your Lordships will not be surprised that these circumstances should have created a deep feeling in the public mind, and that many persons should, upon the first impression, be disposed to think that there is some great defect in the laws of the country with reference to this subject which calls for a revision of those laws, in order that a repetition of such outrages may be prevented. I have felt it my duty, my Lords, in consequence of some suggestions from your Lordships, to consider (in consultation with others) this interesting and important subject, with the view not only of ascertaining correctly what the law is, with reference to it, but for the purpose also of ascertaining (if the law should turn out to be defective) what particular remedy should be applied, and what the nature of that remedy should be. Your Lordships will be aware that this is a most difficult and delicate subject: because all persons who have directed their attention to these inquiries, all persons who are best informed upon it, concur in stating that the subject of insanity is but imperfectly understood. I am not now speaking of general and complete mental alienation.

I am speaking of that description of insanity which consists of a delusion directed to one or more subjects, or one or more persons; and those who are acquainted with this subject know how difficult it is to decide to what extent the moral sense and the moral feeling that guide men's actions is influenced by delusions of this description. We all know that persons who labour under mental delusion with respect to one or more objects are entirely, or apparently entirely, rational with respect to others. They are frequently very intelligent, frequently very acute. It is often extremely difficult to discover the existence of this concealed malady, and the persons who labour under it are uncommonly astute in defeating all endeavors to detect its existence. We almost all of us recollect and know the statement made by Mr. Erskine, in his able and eloquent defence of Hatfield, with respect to the acuteness with which persons who labour under infirmities of this description defeat the skill and sagacity, and over-reach the intellect of the most experienced person. Mr. Erskine tells us of the instance of a prosecution having been directed by a person who had been confined in a lunatic asylum against his brother and the keeper of the asylum for false imprisonment and undue restraint. Mr. Erskine was counsel for the defendant. He says he was informed in his brief and in his instructions that the man was undoubtedly insane; that the particular infirmity existing in his mind was not

disclosed to him; that the prosecutor himself appeared as a witness in support of the indictment; that he was put into the witness-box and examined, and that his evidence throughout the whole of his examination was clear, distinct, collected, rational. Mr. Erskine adds, that he tried to discover some lurking aberration of mind in the course of a cross-examination, conducted, for nearly an hour, with all the dexterity and skill of which he was capable. All his endeavors were foiled. The man's answers were completely rational, betraying not the slightest appearance of mental alienation. At this moment a gentleman came into court who had been accidentally detained elsewhere, and whispered into Mr. Erskine's ear that the witness thought he was the Saviour of mankind. The moment that Mr. Erskine received that hint, he made a low bow to the witness, addressed him in terms of great reverence, and respectfully begged to apologise for the unceremonious manner in which he had treated a person of his sacred character. Mr. Erskine called him Christian, the effect of this mode of address, instant as the touch of Ithuriel's spear, elicited the truth, and showed the real infirmity of the man: he immediately answered "Thou hast spoken: I am the Christ." The case immediately terminated. A similar case is stated by a French writer, M. Pinel, in his work on insanity, with respect to a person confined in the Bicetre. A commission was appointed to visit that prison for the purpose of liberating those persons who were confined there as being of unsound mind, but who were not labouring under that calamity. M. Pinel states, that he examined one particular patient repeatedly upon many successive days, and, though he was a person experienced in those inquiries and a man of considerable learning and sagacity, all his endeavours to prove the man insane were frustrated and foiled. The result was, he ordered a certificate to be prepared for his liberation. It was necessary, before the man was liberated, that he should himself sign the certificate. It was placed before him, and he signed "Jesus Christ." Of course the certificate was destroyed, and the man was not liberated.

I might mention a vast, variety of instances to show the various shapes and forms that insanity of this description takes—instances collected from the works of the medical writers and jurists of this country, of France, and of Germany, where this subject has been much and deeply investigated. The result would be, that your Lordships would be satisfied that any attempt at a definition or description of the particular disease would be altogether futile, and that the only course we can pursue is to lay down some general and comprehensive rule, and to leave those who administer the laws of the country to apply that rule to the different cases as they may arise. The first question for our consideration is, what is the actual law of the country with respect to crimes committed by persons labouring under infirmities and disease of this description. I apprehend, when your Lordships' come to consider it, you will find that there is no doubt with respect to the law—that it is clear, distinct, defined; and I think the result upon your Lordships' minds will be, that it will be quite impossible beneficially to alter the law, or to render it better adapted than it is, in the shape in which it now exists, for the purpose for which it is designed. On this subject I wish to be as clear and perspicuous as possible. It is a subject of great importance, and one in which the public take a deep interest. Everything, therefore, connected with it ought to be laid before the public, through your Lord ships, with the utmost possible precision. I do not think it necessary to quote any text writer on this subject. I shall go at once to the fountain head, and quote for your Lordships what learned judges, in the administration of justice, have said as applicable to this subject, and point to the rules which they have laid down for the guidance of those who have to decide on the criminality or innocence of the parties standing accused before them. The first authority to which I beg to refer is that of a most learned and most accurate judge. I speak in the presence of my noble and learned Friends who recollect that learned judge, and who will concur with me in saying that he never was exceeded by any person administering justice in the accuracy of

the view he took of the law. I mean Mr. Justice Le Blanc. I will state to your Lordships how the law was laid down by that learned judge in a case that was tried before him at the Old Bailey, in 1812, six months after the trial of Bellingham. The circumstances of the case, as far as is necessary to mention them in order, to introduce the judgment to your Lordships, are shortly these; the prisoner had entertained a great antipathy against a particular person named Burrowes; there was no foundation in fact for that antipathy; the person obnoxious to the prisoner had never given the slightest cause of offence; the prisoner, with great deliberation, loaded a blunderbus and shot this person. Fortunately, however, the man was not killed. The prisoner was tried under the act for shooting—a capital offence. The defence that was set up was "insanity." The prisoner had had an epileptic fit, which not un frequently does produce infirmity of mind. About a month previous to the act of violence for which he was tried, a commission of lunacy had been issued against him. The jury empanelled upon that occasion returned a verdict of insanity. Mr. Warburton, the keeper of a lunatic asylum, a man of great experience in these matters, stated, that in his opinion the prisoner was insane, and that insanity of such a description as that under which the prisoner was labouring often led to the harbouring and entertaining of the strongest antipathies, without any cause, against particular individuals. This was the substance of the case presented to the jury. The judge, with respect to the main point, summed up in these words:—

"It is for you (the jury) to determine whether the prisoner, when he committed the offence with which he stands charged, was, or was not, incapable of distinguishing right from wrong, or whether he was under the influence of any delusion with respect to the prosecutor
which rendered his mind at the moment in sensible of the nature of the act he was about to commit, since, in that case, he would not be legally responsible for his conduct. On the other hand, provided you should be of opinion, that when he committed the offence he was capable of distinguishing right from wrong, and was not under the influence of such a delusion as disabled him from distinguishing that he was doing a wrong act, in that case he is answerable to the justice of his country, and guilty in the eye of the law."

He was found guilty by the jury, and afterwards, I believe, executed. I apprehend, that that is the law of the land as far as relates to this subject. If a man, labouring under some mental delusion, acts under the influence of that delusion, and the influence of the delusion is so powerful as to render him incapable of distinguishing right from wrong, in that case he cannot be considered in law as responsible for his act. I apprehend that all the decisions will show that that is the law of the country. The next case to which I shall beg to call your Lordships attention upon this subject is the case of Bellingham, tried before Chief Justice Mansfield. 1 have thought it of importance in this case, on account of the different observations that have been made upon it, to request the solicitor to the Treasury to search to see if there were any short-hand writer's minutes of the proceedings at the trial. The short-hand writer's minutes have been sent to me, and this is the substance of the summing-up of the learned judge who presided, as far as relates to the report now before us. It is unnecessary for me to enter into any of the facts of the case, because they must be sufficiently fresh (notwithstanding the interval of time) in your Lordships' recollection. Chief Justice Mansfield, after making some observations upon the case of men labouring under a total absence of reason proceeds thus:—
"There is a species of insanity, where people take particular fancies into their heads who are perfectly sane and sound of mind upon all other subjects; but that is not a species of insanity which can excuse any person who has committed a crime, unless it so affects his mind at the particular period when he commits the crime, as to disable him from distinguishing between good and evil, or to judge of the consequence of his actions."

And afterwards Chief Justice Mansfield put the case to the jury thus:—

"The question is this, whether you are satisfied that he (the prisoner) had a sufficient degree of capacity to distinguish between good
and evil, and to know that he was committing a crime when he committed this act; in that case you will find him guilty."

So that although the expressions in some sort vary, the two judgments of these two learned judges are, I apprehend, in substance exactly the same; namely, that if the party at the time that he committed the act was in such a state of mind—in such a state of sanity, as to know that he was doing a wrong thing—in that case, but not otherwise, he was amenable to the law. There was an earlier case, to which I shall also call your Lordships' attention, the case of Hatfield. Mr. Erskine, in his most eloquent and powerful defence of the prisoner upon that occasion, stated what he conceived to be the law in eases of this description.

"When a man," said he, "is labouring under a delusion, if you are satisfied that the delusion existed at the time of the committal of the offence—that the act was done under its influence—then he cannot be considered as guilty of any crime."

That was stated in the most eloquent terms by Mr. Erskine to be the law with respect to cases of this nature. The trial of Hatfield was a trial at bar in the Court of King's Bench, and, of course, all the judges of that court attended. Lord Kenyon presided. Lord Kenyon interrupted the defence before it was closed, and made these observations:—

"Mr. Attorney-general, can you call any witnesses to contradict these facts?—With regard to the law, as it is laid down, there can be no doubt upon earth; to be sure, if a man is in a deranged state of mind at the time, he is not criminally answerable for his acts; but the material part of this case is, whether, at the very time when the act was committed, this man's mind was sane?"

He then went on to make some observations on the evidence, and afterwards added:—

"His sanity must be made out to the satisfaction of a moral man meeting the case with fortitude of mind, knowing he has an arduous duty to discharge, yet, if the scales hang anything like even, throwing in a certain proportion of mercy to the party."

Your Lordships, find, therefore, that, in the case which preceded the two others, that I have brought under your notice, Lord Kenyon, and through him all the other judges of the Court of King's Bench, were of opinion that the law as laid down by Mr. Erskine was correct, and that if the man who committed a crime was insane at the time he committed it, that is to say, was labouring under such disease of the mind as not to know whether he were doing right or wrong, in that case he was not a subject for a criminal trial. No departure has been made from the rule of law thus laid down by the three learned judges to whom I have referred. The rule of law so laid down by them was not laid down when those learned judges were sitting alone, but when they were sitting in connection with the other judges of their respective courts, whose opinions, of course, must be taken as having corresponded with theirs. No alteration has taken place in that rule of law, or in the view of it by any of the learned judges who have presided at the late trials. In Oxford's case Lord Chief Justice Denman laid down precisely the same law, and, in order that there might be no mistake with respect to it (being a subject of such deep interest and importance), he consulted the other judges, Mr. Justice Patteson and Mr. Justice Alderson, who were sitting with him, and they concurred with him in a written note as to what was the law upon the subject. The note so agreed upon was read by the Chief Justice to the jury. I take it, therefore, that the law is distinctly settled and distinctly understood upon this subject. If it be so, the next question for your Lordshids' consideration is, whether there is any reason to alter, or I should say any possibility of altering, the law. Can your Lordships say that if a man, when he commits a crime, is under the influence of delusion and insanity, so as not to know right from wrong, so as not to know what he is doing—is it possible that your

Lordships can by any legislative provision say, that such a man shall be responsible for his act, and be liable to lose his life for the wrong he has unknowingly committed? It is impossible. Your Lord ships might pass such a law; you have the power to do so; but when you came for the first time to put it into execution, the sense of all, the feeling of all reasonable men, would revolt against it, and your Lordships would be obliged to retrace your steps, and to repeal the law which you had passed in a moment of excited feeling in consequence of recent painful impressions, but which you could not have passed under the influence of sober and steady reason.

Lord Coke says, that to execute an insane person is contrary to all law, and pregnant with the greatest danger. If your Lord ships entertain any doubt as to the law, you have a course to pursue which is perfectly open to you; it is this—to summon the judges of the land before you, to hear their opinion upon the law; and as the subject is one of great importance to the country, to obtain from them a rule laid down by their united authority, by which to guide the future administration of justice in cases of this description. A rule laid down by the united authority of all the judges might possibly have more influence and more force than the opinion of a single judge conveyed in a charge to a jury. It is for your Lordships to say, whether you think it necessary to resort to such a course. But your Lordships will naturally ask, and with some anxiety and curiosity, what the law of other countries is upon this subject. The law of other countries corresponds, and of necessity must correspond, precisely with our own. The law of Scotland is thus explained by Mr. Alison, a learned writer upon the criminal law of that country:— "To amount to a complete bar to punishment the issanity at the time of committing the crime must have been of such a kind as completely to deprive the prisoner of reason with respect to the act in question, and the knowledge that he was doing wrong."
And if your Lordships refer to the valuable treatise on criminal law by Baron Hume, although the views of that learned writer are more expansively directed and more loosely expressed upon this particular point, your Lordships will yet deduce from him the same conclusion as to the state of the law upon this subject in Scotland. I will now call the attention to a particular case cited by Mr. Alison on the subject. A man was indicted for the murder of another by shooting him whilst he was going across a moor. The defence set up was insanity, and the delusion the prisoner laboured under was this. He supposed the man whom he had shot to be an evil spirit, whom he was commanded by the Almighty to kill. No one doubted that if the facts necessary to support the defence had been made out to the satisfaction of the jury, the judges (it is clear from the way in which the case was conducted) would have considered it a substantial defence; but the facts were not made out, and the man was found guilty from the defect in the evidence, the jury being of opinion, under the direction of the court, that there was not sufficient evidence to show that at the time the man committed the act he really was labouring under that delusion. My Lords,
to pass from Scotland to France. In the Code Napoleon (the criminal code not leas of ancient than of modern France) the French law on the subject is thus laid down:— "With respect to every crime, and every misdemeanor, no man can be made accountable, who, at the time he does the act, is under alienation of mind."

And though, my Lords, I have no particular text writer to quote as to the law of Germany on the subject, I have read many German treatises upon it, in which cases are cited satisfying me that the law of Germany in this respect corresponds with the law of France, the law of Scotland, and our own. The question then is, whether we can, under these circumstances, attempt to vary the law? Is it practicable? Is it possible? and, allowing it to be even practicable, would it be judicious? My Lords, some persons say, "Define precisely what the law is." I say, to attempt to define upon a subject with which we are as yet only partially acquainted would be difficult and

dangerous. Let us leave the general law as it stands, and let the judges, before whom prisoners are arraigned and tried, apply the particular facts to the law so laid down. My Lords, I have heard it said (it is an argument I have heard in the streets), "The object of punishment is the prevention of crime; that you do not punish a criminal by way of retribution; not in a spirit of vengeance upon guilt, but to prevent other persons from committing a similar error." Therefore, it may be said, and it has been said, that although a man is under an insane delusion at the time he commits the offence, yet knows what will be the effect of the act he commits—that is, if he knows that if he fire a pistol it will kill a man that that is a sufficient foundation for carrying the criminal law into operation against him, to prevent others from committing the same crime. My Lords, I should have dealt shortly with a position of this kind, if I had not found it supported in the writings of such high an authority as those of a most rev. Prelate — not at this time, I believe, a member of your Lordships' House, but connected with another part of the United Kingdom. [A Peer intimated to the noble and learned Lord that he was mistaken]. I spoke at the moment in uncertainty, whether or not the most rev. Prelate be now a member of your Lordships' House. However, the most rev. Prelate, after stating a position precisely the same as that I have put, illustrates his position by the example of a dog accustomed to worry sheep.

The animal has no moral sense—no ideas of good and evil; but still you punish that dog—you punish him to correct and prevent him from worrying sheep. That is the illustration of the most rev. Prelate. And now with respect to the position. You punish not in a spirit of vengeance, but as an example to deter others from committing other similar offences. But what is the way you do this? Do you punish persons incapable of committing the crime for which you punish? Or do you punish a person guilty of an offence which is not subject to the punishment you award? No, my Lords. The person must, in the first instance, deserve the punishment, and you then inflict the punishment, not in a spirit of vengeance, but with the object to which the most rev. Prelate alludes. I confess, my Lords, knowing what I do of the sagacity and profound learning of that most rev. Prelate, that I am surprised at his having fallen into what I must, with the utmost deference, consider to be such a logical absurdity. You punish the dog; granted, but not for an example to other dogs. My Lords, if you should be satisfied that I have stated the law correctly, and that no change can take place in that rule of law, the next question' for consideration is this, whether an alteration can be made, or ought to be made, in the form and mode of administering that law. My Lords, as I apprehend, this is equally impracticable. A man accused of the commission of a crime has a right to be charged to a jury, and to have counsel assigned to him for his defence. He has a right to call such witnesses as he may think proper, for the purpose of establishing that defence. His counsel has the right—indeed, it is his duty so to do—to make such observations upon his case, both as to the law and the facts, as he may think most available for the interests of his client; and then the jury is to decide upon the question of the facts. Over the whole of this proceeding, a learned Judge presides, whose duty it is to decide upon the admissibility of evidence, to state the law to the jury, to sum up the facts, and comment upon them with reference to the law; and then to leave the whole, as a question of facts, for the consideration and determination of the jury. That, my Lords, is the form and mode of proceeding in this, as in every other criminal case. Can you change it? Is it practicable to do so? No man can entertain a doubt upon that point. If, then, not only the rule of law, but the mode of administering it be right, what room is there for legislation? You may say, that in a particular instance the law has not been well administered—that the jury drew improper conclusions from facts —that theoretical statements were made to them, which were not justified by science, and that, influenced by them, the jury arrived at an improper conclusion. That is a misfortune to which we must submit,

because it cannot be remedied by legislation. The prosecution in the particular case which has given rise to this discussion was conducted by a learned Friend of mine, filling a high legal office, and as distinguished for remarkable talents, as a lawyer and an advocate, as any man who ever preceded him in the discharge of the important duties he has undertaken. The learned Judges who presided at the trial, three in number, were among the most eminent and enlightened judges of the empire—the Lord Chief Justice of the Common Pleas and two judges of the Court of Queen's Bench, men of admitted learning, exalted talent, and long experience, men most conscientious in character, these were the persons who presided at the trial. What was the law as laid down by the Lord Chief Justice? Precisely the law I have stated. I sent for the short-hand writers' notes of the summing up. I thought it proper to look to this document for the purpose of being sure as to the words made use of by the learned Judge; and I will read it to your Lordships the precise words reported:—

"The point which will be at last submitted to you will be, whether or not, on the whole of the evidence you have heard, you are satisfied that at the time the act was committed for the commission of which the prisoner stands charged, he had not that competent use of his understanding as not to know what he was doing, with respect to the act itself, a wicked and a wrong thing—whether he knew it was a wicked and a wrong thing he had done —or that he was not sensible at the time he committed this act that it was contrary to the laws of God and man. Undoubtedly, if he were not so sensible, he is not a person so responsible."

The learned Judge, towards the close of his summing up, says—

"If, upon balancing the evidence in your minds, you should think the prisoner a person capable of distinguishing right from wrong, with respect to the act with which he stands

charged, he is then a responsible agent, and liable to the penalties imposed upon those who commit the crime of which he is accused."

No person can quarrel with that statement of the law by the Lord Chief Justice. The only question is, whether the jury, when the law was so laid down, drew a right conclusion from the facts stated in evidence before them. My Lords, it has been said, why did the learned judge not suffer the trial to take its course to the very end? I think, considering all the circumstances that have since occurred, it would have been far better if that course had been taken. But, at the same time, I do not believe for a moment there would have been the slightest alteration in the issue; and my reason for so thinking is this: many medical men, highly experienced on the subject, were examined on the part of the prisoner, and there were two medical gentlemen of great eminence on the part of the Crown, who had themselves examined the prisoner, with a view to arriving at the conclusion whether he were sane or not at the time this act was committed. Those medical men were sitting in court, and they were not called on the part of the prosecution. My Lords, these gentlemen not being called upon the part of the prosecution, what is the inference—the absolutely necessary inference? Why, that instead of opposing the testimony of the other medical men, they would have coincided with and have confirmed it. I know of my own knowledge that such would have been the fact. Is it possible, then, if the case had gone to an issue under these circumstances, that the verdict could have been other than that which the jury actually pronounced? In Hatfield's case, which, as I have said, was a trial at bar before the King's Bench of that time, the learned judge interposed, and asked the Attorney-general, "Can you contradict these facts—can you call wit nesses to answer or disprove them?" The Attorney-general having replied in the negative, Lord Kenyon said it was then impossible to doubt the fact. In that case, therefore, precisely the same course was pursued as in the present. And here, my Lords, give me leave to say, that no person, except those present at the time, and who actually saw what was going on, can form

a correct estimate of what was the prudent course to pursue under the circumstances. I have thought it my duty to make these observations to your Lordships. For myself I have only read the general evidence as reported in the newspapers, and, therefore, I cannot say if the testimony was of a nature to justify the verdict. I say nothing whatever. I express no opinion upon that subject. But knowing as I do the extraordinary talents and powers of the learned counsel for the prosecution, the eminent attainments and high character of the learned judges who presided, I must say that, except upon the strongest, possible testimony from witnesses of the most unimpeachable character— persons who had seen the whole proceedings—I never could bring myself to the supposition that justice had not been fairly and substantially done. My Lords, what then is the conclusion to which we must come? That no alteration can be made, or ought to be made, in the rule of law on the subject—that no alteration can be made, or ought to be made, in the mode of administering the law. The only thing, therefore, left for us to consider is, whether, in the way of legislation, measures of precaution stronger than those now in existence can be taken; and to ascertain the extent to which we can proceed in that direction. In a few days I shall be enabled to lay on the Table of the House a measure which, I trust, may be effective. Taking into consideration the skill exhibited by parties labouring under these delusions, I cannot undertake to say that cases of this kind will not occasionally occur.

They have occurred from time to time in this country, in France, indeed in every country of civilized Europe. We may not be able effectually to guard against their recurrence, but still we must by legislation do the utmost in our power for the purpose. My Lords, if with respect to the general law, your Lordships think it necessary to take the opinion of the judges, and to have their united authority on the subject, I will request the attendance of those learned persons. I think such a course will give great authority and great force to the proceedings, and may be attended with practical consequences of good, far better than by interfering by legislation. Let us know from the highest authority, from the voice of the judges, what the law is, let it be laid down by them in precise terms, together with what is to be in future the administration of that law according to their opinion. My Lords, in the course of two or three days, I repeat, I will lay upon the Table of the House the bill of which I have given no-
tice; and if, in your Lordships' opinion, such a course is necessary, I will request the attendance of her Majesty's judges, with a view to the object I have stated.

Lord Cottenham

thought it was impossible to listen to any doctrine which proposed to punish persons labouring under insane delusions. Their Lordships could not mean to say, that the man who was in capable of judging between right and wrong, of knowing whether an act were good or bad, ought to be made accountable for his actions. Such a man had not that within him which formed the foundation of accountability, either in a moral or legal point of view. It had been very forcibly stated, and it was no doubt perfectly true, that, alter the law or not, you would not get any jury who would convict, and hand over to punishment, individuals who, they were satisfied, were in such a state of mind as to be incapable of judging what was right and what was wrong. If that were so, it seemed to him to get rid of the only argument, if argument it could be called, for letting the law take its course on persons in that state of mind. It was said lunatics were capable of being deterred by the fear of punishment. That applied only to persons who were so far sane as to be capable of distinguishing between right and wrong, and there were many such, although they might have a natural infirmity of mind, or a morbid affection of the understanding. You must take a person who was so far deprived of his reason as to be incapable of distinguishing right from wrong; on such a person, he apprehended, the motive alluded to would have no influence, or it, could only operate on persons confined in a lunatic

asylum, and subjected to its discipline which might constrain them to a certain degree of regularity in conduct; but he thought it could have no effect on persons not under restraint, and moving about in society. It had been said, that persons in a lunatic asylum knew they were safe from the law. Such instances might have occurred, but he believed they were very rare. From his experience, he believed it very rarely happened that a person deranged was at the time aware of his derangement. He knew, and he had been often told, that persons in a state of convalescence, recovering from their insanity, were aware that they had been deranged; but, while labouring under the insanity, they *had* no conception of its existence. It appeared very strange that any persons should be labouring under a delusion, and yet be aware that it was a delusion; in fact, if they were aware of their state, there could be no delusion. He begged their Lordships to beware how they thought of making the law subject such persons to punishment, unless they could find a mind diseased sensible of the disease under which it was labouring. He did not see how a more accurate definition of insanity could be given than that which was at present laid down by the law. All that the Legislature could do was to keep the law in a proper state; the judge would explain its dictates to the jury, and then the jury, in each particular case, must apply them according to the circumstances. He could not help thinking, that if juries had always acted up to the true spirit of the law, and had adhered to the definition which the law fixed, giving their verdicts, accordingly, those difficulties which were so much the subject of discussion would not have arisen.

He apprehended, that to the conduct of juries much of the feeling existing on this subject was to be ascribed. But this was a misfortune liable to arise in the execution of all laws, and was not a matter of surprise. He entirely agreed that a consultation with the learned judges would be very desirable, not from any doubt he entertained as to what was the law or what were the opinions of authorities, but because he thought such a step would lead to uniformity of practice, and would be a lesson to judges to take the law from the highest possible authorities, that they might know what the law was and faithfully carry it into effect. His noble and learned Friend had not opened the other part of the subject. Anxious as he should be to take all steps which would be for the public protection, and add to the security of the members of the community, he confessed he should view with the greatest jealousy any measure to facilitate the confinement of individuals on the ground of insanity. This was a subject of very great difficulty, and he should be ready to consider any scheme that might be proposed, but he hoped his noble and learned Friend would bear in mind the latitude of definition which medical men were very apt to attribute to the notion of insanity. There was a well-known story of an eminent medical practitioner who, on surprise being expressed by the examining counsel at the latitude of his definition, answered him by saying, that, in truth, he did not think there were a great many persons who had a mind altogether sound. That was the danger which a very large proportion of medical men were apt to fall into. There was great danger in permitting the liberty of the subject to be infringed on the ground of insanity. After all, it was not to be expected that medical opinions would not have great weight with a court. The statute of George 3rd seemed to him to give powers sufficient for the restraint of dangerous lunatics; it did not occur to him how these powers could he extended with due regard to the preservation of the liberty of the subject. [The *Lord Chancellor:* They may be confined during her Majesty's pleasure.] That law authorised the restraint of persons labouring under derangement, and who there was reason to suppose meditated some unlawful act. They could not be restrained on the ground of derangement solely, for derangement might take a very innocent shape. The law, he apprehended, already gave sufficient power for the confinement and care of such persons. Whether it provided duly for their detention, or for their

disposal while in confinement, might be matter for consideration, but in extending its powers they would be treading on very dangerous ground.

Lord Campbell
thought it his duty to express shortly the result of a very long experience on this subject, and a very long attention to it. In the first place, he should be very sorry, for the sake of the character of the administration of justice in this country, if any doubt were thrown on the verdict in a late trial at the Central Criminal Court, and he was sure it was not at all intended by his noble and learned Friend, who addressed their Lord ships second on this occasion, to throw any doubt upon it. There could be no doubt at all that M'Naughten was properly acquitted; but, at the same time, he must agree with his noble and learned Friend, that it would have been much more satisfactory if the trial had gone to its natural conclusion—if there had been a reply from the Solicitor-general, and a summing up from the learned judge. His noble and learned Friend on the Woolsack had said that the law was very accurately laid down by the learned judge. But what did that signify after he had stopped the trial, and the prisoner was substantially acquitted? The play was over: the judge asked the Solicitor-general if he could rebut the evidence that had been brought forward, because, if he could not, it would be vain to proceed further. The Solicitor-general said, he could not, and that he thought it his duty not to press the case further. He did not wish to throw the slightest reflection on that most distinguished judge, Chief Justice Tindal, who was an ornament to the bench, and a bright example of the

highest qualities that could adorn it; but at the same time he did regret that that learned judge should have been so much impressed by the evidence given by the individual witnesses that he should have thought it right to take that course on the trial. The impression on the public mind was, that if a certain number of medical witnesses, generally called mad doctors, had come into court and said that in their opinion the prisoner was insane when he committed the act, the trial was to be stopped—*cadit questio.* He agreed with his noble and learned Friend who spoke second, that the questions as to the prisoner's sanity ought not to have been put to them—that was a question for the jury, and not for the witnesses. It would be most dangerous if it were to go abroad that the mere expression of a medical man's opinion must be taken as conclusive. He knew a very distinguished medical practitioner, Dr. Haslam, who went a great deal further than the other gentleman referred to by his noble and learned Friend who had spoken last. Dr. Haslam said, "not that there were many who were more or less insane, or that all of us had been insane at one period of our lives, bnt that we all were insane. [Lord *Brougham:* "I have heard him say it."] He had heard him say it repeatedly, and Dr. Haslam would have been ready to prove it. It would be a most dangerous latitude of construction, to allow any person to call himself insane, and plead impunity for a murder committed in open day. The trial to which his noble and learned Friend on the Woolsack referred was very different indeed from that of M'Naughten. It was proved on the former occasion that Hatfield had been in the army, had received a severe wound on his head, and been discharged from a military hospital for being insane. Within three days of committing the act for which he was tried, he believed himself to be the Supreme Being, and at other times uttered the most dreadful blasphemies. Within a few hours before, he made an attempt on the life of his own child, only eight months old, whom he most tenderly loved. Lord Kanyon, with the approbation of the whole country, stopped the trial, and the prisoner was from thenceforth an object of compassion, and not of punishment. He entirely concurred in the view taken by his noble and learned Friend who spoke last. He thought the law of England on this subject admitted of no alteration. As the law now stood, partial insanity did not give any immunity from punishment, and as this was a subject which excited much interest, he would beg permission to read to their Lordships a short, extract from the

treaties of Hale on this subject: "Partial insanity is no excuse; this is the condition of very many, especially melancholy persons, who, for the most part, discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason; and this partial insanity seems not to excuse them in the committing any offence, for it is matter capital. It is very difficult to determine the indivisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered both by judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or, on the other side, too great an indulgence given to great crimes."

As partial insanity did not excuse from punishment, it was necessary to prove that the person was labouring under a delusion at the time, which led to the commission of the act, and that he was not conscious of the distinction between right and wrong, as to observing the law or violating it. He agreed with what Lord Coke had said, that to execute a madman was a miserable spectacle, contrary to humanity and justice, and, above all, offering no example to others; it would excite the horror of mankind, and would only serve to introduce confusion of right and wrong, and bring the administration of justice into open disgrace. But then he (Lord Campbell) did heartily desire that the law might be laid down in a more authoritative manner, and for that reason he perfectly agreed with the expediency of the suggestion made by his noble and learned Friend of calling the judges together. The public mind was in considerable alarm on this subject. The public had been inundated by medical books calculated very much to mislead juries in the case of future trials of a similar kind. Those books spoke of what they were pleased to call a homicidal propensity, and contended that no man, under the influence of such a homicidal propensity, should be held liable for his acts. Dr. Alison, speaking on the subject, said:—

"Few men are mad about others, or about things in general, but many are mad about themselves; though a man understand the difference between right and wrong in the case
of others, he may be under a delusion with respect to his own case, and thus be in a state of mental alienation, which makes him not responsible for his own acts."

And, again, the same writer said:—

"For example, a mad person may be aware that murder is a crime, but may believe that a particular homicide is in no way blameable, because he may believe that certain persons have entered into conspiracies against him, or that some one person may be his mortal enemy."

Now, if this view of the case were at all correct, there was no doubt that a man, acting under the influence of unfounded jealousy, might murder the object of his suspicion, and afterwards be acquitted on the ground of insanity. For these reasons he wished that the law might be laid down in an authoritative manner by the judges. He had looked into all the cases that had occurred since Arnold's case, and looking to the directions of the judges in the cases of Arnold, of Lord Ferrers, of Bellingham, of Oxford, of Francis, and of M'Naghten, he must be allowed to say, that there was a wide difference both in meaning and in words in their description of the law. He would repeat, therefore, that an authoritative statement of the law would be highly desirable, and, if necessary, a declaratory act should be passed. There was the case of Wood, mentioned by Lord Erskine. The man was supposed to be insane, and under that belief was confined in a lunatic asylum in London. He indicted those who had taken him into custody, and at the trial he was cross-examined for more than an hour with a view of showing his insanity, but so cautious was he that he completely baffled the counsel who conducted the cross-examination. At last the right spring was touched, and the insanity of the prosecutor clearly disclosed. This was at Westminster; and the prosecutor then laid an indictment at London. He was now on his guard, and no cross-examination was able to betray him into a manifestation

of insanity. The only mode of proving the man insane was to call the short-hand writer, who read his notes on the former trial, from which it appeared that the prosecutor had said he was the redeemer of mankind, or some other phrase which implied a delusion of an equally striking kind under which the man was labouring. There was only one more subject to which he was desirous of referring, namely, the manner in which these unhappy people were treated who were acquitted on the plea of insanity. The present plan was most mischievous. The person so acquitted was confined in Bedlam, where he became a public character; and not only an object of curiosity, but even of courtesy and respect. He believed, that these cases had multiplied of late from a desire to obtain the comfort, the notoriety, and the indulgences which were supposed to be enjoyed by individuals acquitted on such grounds. A man acquitted on the score of *insanity* ought to be removed from the public eye, and heard of as little as possible afterwards. With these remarks, he would leave the subject entirely in the hands of his noble and learned Friend, with whose views he entirely concurred.

The Lord Chancellor

said, there would be no necessity of legislating as to the disposal of persons acquitted on the ground of insanity, as the law already gave her Majesty the power of confining them in such a manner as she might consider most advisable for the safety of the public. The subject had attracted the attention of her Majesty's Government, and they were of opinion that an individual so circumstanced ought not to be made a public spectacle of in his confinement. As it was their Lordships' wish that the judges should be summoned to give their opinion, he would take great care that they should be called.—Their Lordships adjourned.

(Available at https://hansard.parliament.uk/Lords/1843-03-13/debates/cd7caa8b-624d-4598-a37e-a4e194edd879/InsanityAndCrime?highlight=insanity#contribution-5d8381fe-1981-40ff-96b7-f477c56022f2)

KC
THE KING'S COUNSEL
MAGAZINE

SPECIAL MESSAGE TO THE PRESIDENT OF THE UNITED STATES OF AMERICA JOE BIDEN ON NATIONAL SECURITY OF CANADA, UK, NATO, ISRAEL, INDIA, JAPAN, SOUTH KOREA, AUSTRALIA AND NEW ZEALAND

Dear Mr. President,

The invention of hypersonic missiles by the perceived enemies of the United States would be a huge national security concern. The speed with which they are delivered will wreak havoc resulting in breaking the constitutional order of the United States which it had cherished for two centuries. The attack on the U.S. satellite communication facilities in space could be the first strike option against the U.S. It could cut off the President of the U.S from the Nation, from the Military Commanders and the civil government as a result you will not be able to communicate with U.S allies viz., Canada, UK, Europe/ NATO, Israel, Japan, South Korea, India, Australia, New Zealand, and elsewhere. Your position as Commander-In-Chief of the U.S forces would be meaningless if you are unable to communicate with the Nation. The key allies of the U.S., would lose confidence in your ability to wage a coordinated battle against the perceived enemies. The authoritarian regimes in the World would feel triumphant and forge new strategic alliances.

We, KC – The King's Counsel Magazine, call upon you to immediately appoint a Presidential Commission to inquire into the efficacy of the U.S constitution and whether it should be suitably revised or amended to deal with the new threats. This will ensure that the security of the strategic allies of the U.S too is guaranteed in case such an eventuality takes place.

OVER TO YOU MR. PRESIDENT

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